INDEX TO REPLY BRIEF

Table of Cases

Text Book Cited

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 113

BATH MILLS, INC., *Petitioner and Appellant*

vs.

THEODORE ODOM, *Appellee and Respondent*

REPLY BRIEF

We ask to reply to Respondent's Brief as follows:

An Important Question of Local Law Is Undoubtedly Involved Herein

Respondent's counsel see fit in their brief to resort to a highly technical objection, namely, that under Sec. 1 of Rule 12, Appellant, as they state it at p. 18 of their brief, "has failed to show and prove the basis upon which it is contended that the Court has jurisdiction." The reference is to whether an important question is involved herein.

To begin with Rule 12, Sec. 1, has to do with appeals alone, not petitions for writs of ceritorari. Rule 38 governs petitions for writs of certiorari. That rule is complied with, we submit, by the respondent herein. See p. 5 of petition and pp. 11, 12, 13 of respondent's supporting brief.

The fact that in reality the question involved is an important one stands out throughout the petition and supporting brief and the whole case is redolent of that fact, for the following reasons and others,—

(1) At common law employers have the right to defend on the ground not only of contributory negligence but of contributory recklessness and wantonness. If the South Carolina Workmen's Compensation Act has been improperly construed and enforced by the Circuit Court of Appeals herein, in view of the decisions of the South Carolina Supreme Court, then the employer herein is being deprived of Five Thousand Dollars without due process of law. (This observation also constitutes our reply to Respondent's point B.)

(2) Respondent does not and cannot deny that there are many employers in South Carolina who have exercised their right not to operate under its entirely optional Workmen's Compensation Law. The decisions of the Supreme Court of South Carolina cited and quoted from, in appellant's supporting argument (p. 23-25) of Nuckolls Tea Co. 192 S. C., 156; 5 S. E. (2nd) 862 and *Caughman* v. *Y. M. C. A.*, Westbrooks Reports of May 15, 1948, definitely prove this fact. Hence, it follows that to many employers and thousands of employees in South Carolina a decision of the point involved, to govern existing and future lawsuits, is vastly important.

(3) While a complete list of states in which optional Workmen's Compensation Statutes are in force is not available to us, the notes to the treatment of the subject of the optional statutes, in Schneider's work on "Workmen's Compensation Law" (p. 63 et seq.) definitely shows that there are many such states, and this work at p. 104, states that "many of the acts which are elective" deprive

the defendant of the defense of contributory negligence. The author in his footnote supporting this statement, lists decisions from twelve states. Hence, thousands of employers and myriads of employees not only in South Carolina, but throughout the nation are concerned with the question herein presented. It is a matter of prime importance, we submit.

Is the Decision Below, Contrary to the Local Decisions?

Despite the imposing array of decisions by the Supreme Court of South Carolina which are set out in appellant's brief to the effect that recklessness, wilfulness and wantonness and contributory recklessness, wilfulness and wantonness on the one hand, are separate and distinct legal doctrines and principles from mere negligence and contributory negligence on the other hand, the second postulate of Respondent's argument is that in reality recklessness, wilfulness and wantonness are mere degrees of negligence. This position is taken with no reference to and indeed with a complete and studied disregard (because it cannot be answered) of the fact that the Supreme Court of South Carolina in *Pickens* v. *Railroad* 54 S. C. 498; 32 S. E. 567, has ruled "*Negligence and wilfulness are the opposites of each other.*"

Respondent's argument is based practically solely upon the opinion written by a temporary occupant of a seat on the bench of the Supreme Court of South Carolina (Mr. Harry N. Edmunds) which has never been followed by other decisions and which, if it supports respondent's position (which fact, we deny), is in the teeth of myriads of the decisions rendered both before and after his decision. Further, it is a fact that Respondent's contention is based on two disconnected excerpts from the acting Associate Justice's

opinion which definitely, we submit, do not correctly set out even his meaning.

We do not imagine that the Supreme Court of the United States is, at this time, interested in dissecting this passing opinion but inasmuch as respondent's entire argument is practically based upon it, we are, at the risk of prolixity, setting out in an appendix hereto, the whole of the opinion touching the point at issue with some comments by us, for the convenience of the Court, should it desire seriously to consider the opinion in question.

Including those decisions of the Supreme Court of South Carolina from which quotations appear in the opinion, in re *Bailey* v. *Smith* 132 S. C. 212, 128, S. E. 423 from which we quoted copiously in our supporting brief, we have heretofore presented fifteen decisions of the Supreme Court of South Carolina supporting our contention of what that court has held. Respondent's reliance is practically based solely on the Thornhill decision. *Bailey* v. *Smith* itself which collected practically all of the older decisions and approved them, and four of the other decisions set out in our supporting brief were handed down after the *Thornhill* case was decided. All definitely support our contention.

We thought this was enough, but so frequent have been the decisions of the Supreme Court of South Carolina upon that question that we can easily lengthen the list. All of the following additional decisions, in one form or another, support our contention to the effect that negligence and contributory negligence on the one hand are, in South Carolina, different principles from recklessness and wilfulness and contributory recklessness and contributory wilfulness on the other hand. Those decisions now listed as reported in volumes subsequent to 121st South Carolina Reports in which the *Thornhill* case is reported, were rendered after that decision was handed down. It, therefore, follows that

Thornhill decision did not change in the slightest degree the long existing rule which still exists in South Carolina. We list:

Watts v. *Rwy.*, 60 S. C. 67; 38 S. E. 240;
Oliver v. *Rwy.*, 65 S. C. 1; 43 S. E. 307;
Boyd v. *Rwy.*, 65 S. C. 326; 43 S. E. 817;
Bennett v. *Union Station Co.*, 90 S. C. 308; 73 S. E. 340;
Burns v. *Kendal*, 96 S. C. 385; 80 S. E. 621;
Wanamaker v. *Traywick*, 136 S. C. 21; 134 S. E. 234;
Weeks v. *Power Co.*, 156 S. C. 158; 153 S. E. 119;
Leppard v. *Railway*, 174 S. C. 237; 177 S. E. 129;
Anderson v. *Railway*, 179 S. C. 367; 184 S. E. 164;
Sanders v. *Railway*, 180 S. C. 138; 185 S. E. 180;
Cox v. *Coleman*, 189 S. C. 218; 200 S. E. 762.

The Supreme Court of South Carolina has steered a straight course as to this question. In the Pickens decision it ruled that "Negligence and wilfulness are the opposites of each other". In later decisions it elaborated on this principle. It pointed out that while lack of due care is involved in each instance, that inadvertence as to performing the duty of exercising due care on the one hand and an advertent failure to do so on the other hand is the differentiating factor between negligence and gross negligence on the one hand and recklessness, wilfulness and wantonness on the other hand. But when the lack of due care ceases to be an unconscious failure of duty and becomes a conscious, an advertent failure of duty, its whole nature changes. That is the whole meaning of all of the decisions of the Supreme Court of South Carolina.

The question is not, in reality, as Counsel and the learned District Judge, who tried the case, considered it, we submit, of degrees of negligence, but of the employee's state of mind. If he inadvertently failed to exercise due care he was guilty of negligence, whether it was ordinary negligence or

gross negligence. On the other hand if he consciously, advertently failed to exercise due care, he was guilty of the opposite of negligence, he was guilty of recklessness, wilfulness or wantonness. This is the crux of the matter.

We have advisedly stated that respondents counsel base their argument practically entirely on the Thornhill decision. This is an absolutely correct statement, we submit. They, however, also mention but four other decisions, which, we submit, are not apposite to the present inquiry and which we ask now to briefly refer to.

Four Other Decisions Cited By Respondent

Counsel invoke the expression contained in the opinion of the Supreme Court of South Carolina in *Bell* v. *Railroad*, 202 S. C. 160, 24 S. E. (2d) 177, based on the decision of the Court in *Sample* v. *Gulf Refining Co.*, 183 S. C. 399, 191 S. E. 209, that:

> "While punitive damages are recoverable for negligence so gross or reckless of consequences as to imply or assume the nature of wantonness, wilfulness or recklessness, yet they are not awarded in this State for mere gross negligence."

It is significant to note that in the *Sample* case, there was a reversal because the presiding Judge had charged the jury that punitive damages could not be awarded, in a case of injury to plaintiff's business:

> "Unless the defendant was so grossly negligent in determining whether it would injure or damage his business."

Manifestly what the Supreme Court, in granting a new trial on account of the foregoing charge, was ruling in the language relied on by counsel, was simply and only that gross negligence was not enough to warrant imposing puni-

tive damages. The Bell decision does not carry the matter further.

What the language relied upon actually states is that in order to permit the imposing of punitive damages the conduct in question must be so reckless of consequences as to assume the nature of wilfulness. This is nothing more than the statement of the Court (set out on page 9 of our argument in chief) in the Tinsley decision that:

> "An inadvertent failure to observe due care indicates mere negligence, but an advertent failure to observe due care passes beyond mere negligence into wantonness or wilfulness."

Nor is the language of the Sample decision anything more than the doctrine of the Proctor decision (also set out on page 9), that:

> "It is quite true that negligence may be so gross as to amount to recklessness, but when it does it ceases to be mere negligence, and assumes * * * the nature of wilfulness."

This we again submit is the crux of the matter. It *ceases to be negligence entirely.*

Respondents counsel at pp. 8-9 of their brief refer to *Templeton* v. *Railroad,* 117 S. C. 44; 108 S. E. 313 which is entirely inapplicable to the present inquiry, we submit, in that it only holds that under the Federal Employers Liability Act gross negligence is not a separate principle from negligence. The principle of recklessness and wilfulness was not even remotely involved.

Respondents counsel also cite *Baxley* v. *Railroad,* 193 S. C. 429; 8 (2d) S. E. 744 and *Cook* v. *Railroad,* 183 S. C. 279; 190 S. E. 923 at pp. 10-11 of their brief. In reply we wish to point out that the Baxley decision has no application to the instant case, as that case was brought under the

railroad crossing statute which makes gross negligence a perfect defense to the recovery of any damages, in a crossing accident case such as the *Baxley* case. And the Cook decision is not apposite to the instant case, because its holding is simply a restatement of the doctrine enunciated long ago in South Carolina that punitive damages cannot be awarded unless plaintiff has suffered some actual damage, although it may be merely nominal. Further as to so much of the Cook decision which counsel claims "held that exemplary damages which must be based upon recklessness or wantonness 'do not and cannot exist as an independent cause of action' "; we ask to cite the subsequent decision of the Supreme Court of South Carolina in re *Hallman* v. *Cushman*, 196 S. C. 402, 135 S. E. (2d) 498, in which the Supreme Court of South Carolina said:

> "It is true that a cause of action for punitive damages and a cause of action for actual damages are logically and technically separate and distinct, although they may be pleaded together under the statute frequently termed the 'jumbling act.' Sode 1932, see 484."

The Effect of Counsels Stipulation and Agreement

Under the heading "The Circuit Court of Appeals did not depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision," respondents say that they are at a loss to understand our position on this point. Hence, we briefly restate it.

The solemn stipulation of counsel herein (R. 26-8) after reciting that the District Judge struck out the defense of contributory recklessness and contributory wilfulness, definitely stated:

> "The case then went to trial *and was tried throughout*, subject to and in accordance with the aforesaid ruling of the Court, and upon the theory and basis and

with the effect of the defendant not being permitted to defend the suit on the grounds of contributory negligence, recklessness and wantonness." (Emphasis added.)

The Circuit Court of Appeals without referring at all to this stipulation which governed the case, said that as the evidence had not been brought up that it could not be sure that the defendant was prejudiced by its defense having been stricken out. The Court added that it was "perfectly clear from the pleadings and statements at the bar of the Court that the facts upon which defendant relied amounted to nothing more than contributory negligence." But the Court, in effect, immediately revealed the fact that it did not rely on that point. Manifestly the answer positively alleged (R. p. 26) contributory recklessness and contributory wantonness; and certainly, the Court's treatment of the matter shows that no "statements at the bar" admitted or substantiated the contrary view. Otherwise the Court would have disclosed the statements, (as we wish it had) and would have taken positive action then and there. But the Court did not do this, but passed this phase of the matter over as being unconsequential, as it was, and immediately went on to state that if it "entertained any doubt as to the correctness of the Court's action in striking the defense, we would order the remainder of the record sent up, so that we might judge upon the whole case whether defendant had suffered prejudice as a result of the ruling." But the Court did not order the record sent up, and the Court in the next sentence made clear, we submit, that it was not depending upon or basing its decision at all on its previous statement by definitely stating:

"It is not necessary to do this, however, as we are satisfied that the action of the Court in striking the defense was proper."

Hence, our position and understanding of the matter is that the Court did not base its decision on the consideration referred to, but based it definitely on the clear-cut legal question involved. But we submit that if we are wrong in this understanding and if the decision of the Court is not to be considered as being grounded on that clear-cut legal question, then with the greatest respect possible, we submit that the Court to use the words of Rule 38 "so far departed from the accepted and usual course of judicial proceedings • • • as to call for an exercise of this court's power of supervision." We do not consider however that such a situation exists, but that we have to deal only with the clear-cut legal question.

Finally we wish to reiterate what we stated in our supporting brief, namely, that as the stipulation and argument of counsel states, the case was tried throughout, subject to and in accordance with the ruling of the Court. We stated at pp. 30-31 of our supporting brief as follows:

> "Hence the defense was never before the jury. The jury, therefore, knew absolutely nothing of its existence. It was a hushed and forbidden subject in the trial. Even if incidentally some facts came out on which it might have been based, they could not be pointed up, stressed and connected up by counsel. The subject, we repeat was a forbidden subject. Sending up the record now as the Court suggests would do no good, because the record was not built with the question involved as a part of it. The question was, we repeat, a completely forbidden subject. The District Judge could not and did not rule on the sufficiency of the testimony because, as we have stated, counsel for the defendant was not permitted by the Court to build up a record to present that question but was reprimanded when the Court thought he was trying to do so. Counsel for the plaintiff having already been successful in striking the defense from the answer, was not interested in the point. Then, of course, counsel could not even

mention contributory recklessness, wantonness, or wilfulness in argument, nor did the District Judge do so in his charge. So the stipulation was literally correct."

The correctness of this contention has in no means been questioned in respondent's brief.

We earnestly submit that the Writ of Certiorari should be granted.

Note—It has been called to our attention that the Circuit Court of Appeals in its decision inadvertently stated that the appellant is a corporation of the State of South Carolina. This is of course a mere inadvertence. The complaint shows to the contrary and the stipulation of counsel recites the regular removal of the case to the United States Court, and there was no motion to remand.

Respectfully submitted,

P. F. Henderson,
Henderson & Salley,
Appellant's Counsel.

Aiken, S. C.
July 27, 1948.

APPENDIX

Note—In this appendix for the purpose of making references thereto, we have numbered the eight quoted paragraphs and have added some emphasis.

Thornhill *vs.* Davis, 121 S. C. 49; 113 S. E. 370.

"The opinion of the Court was delivered by Acting Associate Justice H. N. Edmunds."

(After a short preliminary statement as to the complaint, the opinion reads:)

(1) "The answer, in addition to denying the allegations of the complaint setting forth the alleged delicts on the part of the defendant, sets up the defenses of *contributory negligence* and assumption of risk. The issue thus being joined, the action came on for trial before Hon. George E. Prince and a jury at the April term, 1921, of the Court of Common Pleas for Greenville County.

(2) "Motions were made by the defendant for a nonsuit, and for a direction of verdict, both of which were overruled. Subsequently a verdict was rendered by the jury in favor of the plaintiff in the form which will hereinafter be referred to more particularly in considering the exceptions relating to the form of the verdict.

(3) "*The plea of contributory negligence* on the part of the plaintiff's intestate, and the testimony relating thereto, form the basis of one of the principle exceptions made by appellant. We will accordingly take up the consideration of this matter first.

(4) "Contributory negligence as a defense is applicable to an action under the Federal statute to the extent, but to the extent only, of operating to minimize the damages in case the jury should find that the injured party was guilty of contributory negligence in the particulars alleged in the answer. The appellant contends that this rule does not apply in the present

case, for the reason that the testimony established, not merely contributory negligence on the part of the plaintiff's intestate, but established contributory recklessness and willfulness. The answer with great particularity alleges the facts constituting the defense of the alleged contributing cause on the part of the deceased, alleging that—

(5) "He had gone 'to the end of said string of cars for the purpose of seeking shade and sat upon the rail at the end of the car; * * * that in this position * * * the engine * * * coupled up * * * to the said car at the opposite end of said string of cars, the impact of which caused the car against the wheel of which the deceased was leaning to run over and kill the deceased; *and that the deceased was negligent of his own safety.*'

(6) "The assignments of error under the seventh, eighth, thirteenth, and seventeenth assignments are that the trial judge erred in overruling the motion for a directed verdict upon the ground that the testimony showed that the deceased met his death by his own gross negligent and careless act, *as was set up in the defense referred to,* and, further, that the trial Judge erred in *failing to charge* the jury that the plea of 'contributory recklessness or willfulness' was a complete defense under the Federal Employers' Liability Act—that is to say, that while the defense of contributory negligence merely operates in mitigation of damages, on the other hand contributory recklessness or willfulness operates as a bar to the action when established by competent testimony.'

(7) "*While it is not essential to our conclusion* upon the exceptions raised relating to this matter, it may be remarked that Congress in limiting the force and effect of contributory negligence in an action of this character had in mind the changing of the application of the rule of evidence in such cases. Instead of such evidence operating to defeat the right of action entirely, after

the passage of the act, in cases brought under the act, such evidence operates only to a reduction of the damages which the plaintiff would otherwise, in the absence of such contributing cause, be entitled to receive. Under this rule of law, the matter of contributory negligence *and the degree thereof,* if any, becomes one for the jury to consider in determining the amount of damages which should be awarded in case it should be found that any damages were recoverable. The reduction in amount then would vary with the degree of negligence operating as a contributing proximate cause to the injury by the injured party—if slight, the jury would be warranted in making a slight reduction in the amount which it would have otherwise awarded; if great, it would be warranted in making an entirely different estimate of the amount to which the damages should be reduced. The allegations of the degrees of negligence and the proof thereof are matters then to be considered by the jury in reaching its conclusion as to the amount to be awarded after having concluded that a case of liability has been established. *In any event, of course, it is essential that liability* must be established, and the necessity therefor eliminates recovery when the injury complained of is caused solely by the act of the one injured, whether it be done by him either negligently or recklessly. There is left open, however, in all cases where the evidence is conflicting, the deter mining by jury of the amount of recovery and the proper reduction thereof to be varied, as we have said, according to the degree contributed by the injured party to his injury.

(8) "*Whether then* there was error on the part of the trial Judge in the particulars assigned depends upon whether from the testimony it was to be concluded as a matter of law that the deceased came to his death solely on account of the acts alleged in the answer by way of affirmative defense, or whether there was an issue of fact with regard thereto to be submitted to the jury. The appellant assumes that the defense was

established *by uncontradicted testimony,* and that the only conclusion which could be drawn from the testimony was that the plaintiff's intestate, as stated in the motion, met his death 'solely by reason of his own gross negligent and reckless conduct' in the particulars set forth in the motion. *That the testimony was susceptible of an entirely different construction,* that a clear issue of fact was made, and that the issue on this point was one to be passed upon by the jury is apparent from the reading of the testimony. The jury could have adopted appellant's view, namely, that the plaintiff was performing his duties as foreman of a maintenance force clearing the tracks of the appellant, in which work the plaintiff was actually engaged at the time when, without warning and without observing the proper precautions under the circumstances alleged, and as testified to, the plaintiff's intestate was run over and killed by the train operated by the defendant. *The trial Judge,* however, with a conflict of testimony on the issues thus joined, *could not adopt either view*—to have done so would have been error—*and his refusal to do so was proper.* The assignments of error relating to these matters cannot, therefore, be sustained.' ''

Our comments are:

(1) The defense that was interposed by the Answer was mere *contributory negligence,* not as respondent states (p. 6 of their argument) "the plea of contributory recklessness or wilfulness as a complete defense under the Federal Employer Act."

Not being pled contributory recklessness and wilfulness was not before the Court in the Thornhill case. It is definitely pled in the Odom case.

(2) Evidently defendant's attorney in arguing the appeal, although he had failed to plead it, raised the point that contributory recklessness or wilfulness might be a complete defense. He, however, had not properly raised the point. But the Acting Justice, nevertheless but saying explicitly in the opening words of the seventh paragraph of the foregoing quotation, "*while it is not essential to our*

conclusion upon the exceptions raised relating to this matter," stated as his personal opinion only that "the matter of contributory negligence *and the degree thereof,* if any, becomes one for the jury to consider in determining the amount of damages." Let it, however, be noted especially that the Justice did not consider that the point had been raised by the exception.

Then the Justice, having in passing and as a mere obiter on his part made the reference referred to (which he had prefaced by saying that it was "not essential," *upon the exceptions raised*), in the final paragraph of the foregoing excerpt as his real conclusion of the matter, ruled that a directed verdict could in no event have been rendered because the testimony was conflicting.

(3) In the sixth paragraph of the foregoing excerpt, it appears that the assignments of error were:

(a) Error "in overruling the motion for a directed verdict upon the ground that the deceased met his death by his own gross negligent and careless act *as was set up in the defense referred to,*" and

(b) Error "in failing to charge the jury that the plea of contributory recklessness or wantonness was a complete defense."

As to (a) we call attention again to the fact that the emphasized statements in paragraphs (1) and (5) of the above excerpt show definitely that only "contributory negligence" in "that the deceased was negligent of his own safety" was pled. Hence, the question of contributory recklessness and wilfulness was never properly presented to the Court.

As to (b) we make the same remark and add that as no request to charge was presented there could be no error in any event, not to so charge.

We respectfully submit that the Thornhill decision did not alter the firmly established South Carolina rule, which was first enunciated in the Pickens decision in 1898 and which has been consistently followed to the present day.